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No.

In The

Supreme Court of the United States

October Term, 1997

NATIONAL UNION FIRE INSURANCE COMPANY and THE RESTAURANT ENTERPRISES GROUP,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 2680(a) of the Federal Tort Claims Act excepts from federal jurisdiction any claim based on the discretionary function of a federal agency or employee.

1. Does an assertion that the United States did not perform repairs because it was considering an improvement beyond the repairs, make the failure to repair a discretionary act and thus bar the claim under the discretionary function exception to the Federal Tort Claims Act, even if the improvement is not made?

2. Does a federal agency's reports prepared pursuant to federal statute constitute a source of a prescribed course of conduct that must be considered in determining whether the agency had discretion to act or not to act?

3. When, if at all, can the United States invoke the discretionary function exception based upon budgetary considerations?

PARTIES TO THE PROCEEDING

All parties in this Court appear in the caption of the case.

Petitioner National Union Fire Insurance Company of Pittsburgh, Pennsylvania, ("National Union"), a Pennsylvania corporation, is a wholly owned subsidiary of American International Group, Inc., a Delaware corporation, which is publicly traded. National Union has no nonwholly owned subsidiaries.

Petitioner The Restaurant Enterprises Group ("REG"), a Delaware corporation, now known as Family Restaurants, Inc., a Delaware corporation, has no parent companies and no nonwholly owned subsidiaries.

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The opinion of the United States Court of Appeals for the Ninth Circuit in *National Union Fire Insurance Company v. United States of America*, is reported at 115 F.3d 1415, and is reprinted at Appendix A. The opinion of the district court is not reported and is reprinted at Appendix B.

STATEMENT OF JURISDICTION

This petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit filed on June 10, 1997. Petitioners National Union Fire Insurance Company and The Restaurant Enterprises Group filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied by order filed September 29, 1997. The order of the Court of Appeals is reprinted at Appendix C. This petition is filed within 90 days of the entry of that denial, pursuant to 28 U.S.C. § 2101(c) and United States Supreme Court Rule 13. The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the

> scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(Appendix ("App.") D, p. 31a.)

The Federal Tort Claims Act, 28 U.S.C. § 2674, in part provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

(App. D, pp. 32a-33a.)

The Federal Tort Claims Act, 28 U.S.C. § 2680(a), provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(App. D, p. 33a.)

Rivers and Harbors Act, 33 U.S.C. § 541, in part provides:

> And the board shall submit to the Chief of Engineers recommendations as to the desirability of commencing or continuing any and all improvements upon which reports are required. And in the consideration of such works and projects the board shall have in view the amount and character of commerce existing or reasonably prospective which will be benefited by the improvement, and the relation of the ultimate cost of such work, both as to cost of construction and maintenance, to the public commercial interests involved, and the public necessity for the work and propriety of its construction, continuance, or maintenance at the expense of the United States.

(App. D., pp. 34a-35a.)

STATEMENT OF THE CASE

This is an action under the Federal Tort Claims Act ("FTCA") and concerns the scope of the discretionary function exception to the FTCA. Jurisdiction in the district court was conferred under 28 U.S.C. § 1346(b).

A. Material Facts

This action arises out of the destruction of Reuben's Restaurant ("Reuben's") in Redondo Beach, California, which occurred when waves overtopped the breakwaters in the Redondo Beach King Harbor ("the Harbor") during a storm on January 17 and January 18, 1988 ("the 1988 storm").

The Army Corps of Engineers ("the Corps") originally

constructed the breakwaters in the Harbor in 1958 pursuant to General Design Memorandum No. 1 ("GDM1"). (Excerpts of Record ("ER") 180.) The local interests provided

> all lands and rights-of-way required for the construction and maintenance of the proposed improvements, including transfer of ownership of the existing section of breakwater to the United States . . . .

(ER 156.) The United States was responsible "at Federal expense" for "[m]aintenance of the entire existing breakwater *as re-constructed*, the breakwater extension and the south breakwater," and was to "maintain the breakwaters and aids-to-navigation facilities." (ER 160, 166; emphasis added.)

The local interests were to construct and maintain Harbor facilities "except the breakwaters." (ER 156, 173.) The breakwaters were designed to have

> a crown width of 16 feet at an elevation of 14 feet above mean lower low water ("MLLW") which is the minimum elevation that would prevent appreciable overwash by waves of the design height.

(ER 168.)

General Design Memorandum No. 2 ("GDM2") issued in 1964 confirmed that the breakwaters had been constructed as provided in GDM1 and provided that "[t]he existing breakwaters and aids-to-navigation are maintained by the United States at an estimated annual cost of $30,000." (ER 187.) GDM2 proposed an improvement to raise the north breakwater height to plus 22 feet above MLLW to reduce the overtopping of the breakwaters. (ER 187.)

General Design Memorandum No. 3 ("GDM3") issued in 1990 set forth the history of the improvements to the breakwaters made following GDM1 and GDM2. (ER 206-209.) GDM3 also set forth the repairs made in 1982, 1983, 1986 and 1988, which were performed without corresponding reports. (ER 206, 207.) GDM3 further confirmed the United States' responsibility for "breakwater maintenance" and estimated "maintenance requirements due to future subsidence." (ER 197, 236.) Again, GMD3 provided that the local interests "shall provide without cost to the United States all lands, easements, and rights-of-ways necessary for the construction and subsequent maintenance of the project . . . ." (ER 238.)

In June 1984, the United States issued an Evaluation Report for an improvement of the breakwaters. (ER 239.) However, GDM3 reveals that the improvements were not even made by the June 1990 issue date of GDM3. (ER 206-207.) The last improvement was made in 1976. (*Ibid.*)

At trial, Alan Alcorn ("Alcorn"), an engineer for the Corps' Los Angeles District, testified that the Corps was responsible for the maintenance of the breakwaters ever since the Corps' construction of the breakwaters. (ER 265; Supplemental Excerpts of Record ("SER") 69.) Alcorn claimed that as of a 1985 survey and before the 1988 storm, the Corps was investigating what to do about the "small" discrepancy between the actual height and the design specifications. (ER 276-277.) As more fully discussed within, this so-called "small" discrepancy ranged from two feet to four feet at different locations.

Alcorn testified that repairs to return the breakwaters to design specifications were not made before the 1988 storm because only three- to four-foot stones were available and such stones would have raised it above specifications and beyond the

elevation authorized. (ER 277-278.) However, he also testified that the Corps knew in or about 1985 that portions of the breakwaters were up to four feet below specifications. (ER 267.) Upon further questioning, Alcorn acknowledged that the three-to four-foot stones actually would have raised the breakwaters' height to design specifications, plus or minus the one-foot tolerance allowed. (SER 116.)

Thomas Mitchell ("Mitchell"), a Corps engineer and the United States' "corporate" designee, testified that the Corps had historically performed repairs on the breakwaters to return them to design specifications. (SER 74.) Tadahiki Ono ("Colonel Ono"), the Commander of the Corps' Los Angeles District, testified that authorization was not required to make "emergency" repairs to the breakwaters in 1988 and that such authorization had not been required to return them to design specifications in prior years. (SER 136-137.) Colonel Ono testified that after the 1988 storm, the Corps had finally repaired the breakwaters to return them to design specifications. (SER 136-137.)

Upon the evidence, the district court made the following relevant findings: (1) the Corps learned through a survey in 1985 that the breakwaters were two to four feet below the design specifications set forth in GDM1 and GDM2; (2) no repairs were made to return the breakwaters to their design specifications before the 1988 storm; (3) the United States had the authority and obligation to maintain the breakwaters at their specifications; (4) the United States failed to maintain the breakwaters; and (5) the two-to four-foot discrepancy in the breakwater elevation was a substantial cause of the damage to Reuben's. (App. B., pp. 20a-24a.) The district court further found that National Union had shown damages of $3.75 million and REG had shown damages of $485,110. (App. B, pp. 22a-23a.) However, the district court limited the damages awarded to National Union to $2 million based on its administrative claim. Thus, the total award was $2,485,110.

The district court further concluded that the decision not to maintain the breakwaters at the elevations specified in GDM1 and GDM2 was not a discretionary function. (App. B, p. 26a.) The United States did not dispute the factual findings, other than denying its obligation to maintain the breakwaters created a legal duty and asserting that its failure to do so was a discretionary function.

B. The Ninth Circuit Decision

In its opinion, the Ninth Circuit prefaced its analysis with a statement that the cases discussing the discretionary function exception to the FTCA, were

> if used merely as a source of "rules" in the form of quotations, hard to apply, because they seem on their face somewhat contradictory, with a fair amount of backing and filling.

(App. A, p. 6a.) The Ninth Circuit further referred to the United States Supreme Court's decisions as a "complex body of law." (App. A, p. 11a.)

On the facts, the Ninth Circuit concluded that this case was more like those cases where the discretionary function exception was applied than those cases where the exception was not applied. (App. A, p. 13a.) The Ninth Circuit stated that

> [t]he critical decision to which responsibility for the loss may be attributed was the one in 1985, to put off the smaller improvement while studying the possibility of a larger one.

(App. A, p. 7a.)[1]

1. As fully discussed within, returning the breakwater to its design height was not an "improvement," but rather an act of maintenance and repair.

The Ninth Circuit opined that the Corps exercised discretion when balancing the factors set forth in 33 U.S.C. § 541 in determining whether or not an improvement should be made. (App. A, pp. 7a-8a.) The Ninth Circuit further opined that no regulation or policy required the Corps to do something that it failed to do. (App. A, p. 13a.) Rather, according to the Ninth Circuit, people at the "planning level" exercised discretion in deciding to do nothing while considering whether to roll the smaller repair into a bigger improvement later. (App. A, pp. 13a-14a.)

The Ninth Circuit recognized that its prior decisions were at odds as to whether budgetary considerations could provide a basis for invoking the discretionary function exception. (App. A, p. 14a.) The court noted that in the decision in *ARA Leisure Services v. United States*, 831 F.2d 193 (9th Cir. 1987), it had held that budgetary considerations could not provide a basis for invoking the discretionary function exception, while in the decision in *Kennewick Irrigation District v. United States*, 880 F.2d 1018 (9th Cir. 1989), the court had held the opposite. (*Id.*) However, the court attempted to reconcile these decisions by holding that cost could be taken into account depending on the applicable statutes, regulations, and policies. (*Id.*) The court reasoned that since 33 U.S.C. § 541 identified costs as a factor, costs could be taken into consideration in the Corps' failure to maintain the breakwaters at design height. (App. A, pp. 14a-15a.)[2]

While noting that the Corps "gambled" on the weather, "threw the dice, and the businesses on shore lost," the opinion closed by stating:

---

2. As fully discussed within, 33 U.S.C. § 541 is actually inapplicable to this matter since the statute only applies to improvements "upon which reports are required," and the maintenance of the breakwaters did not require reports. (*See infra* at 11.)

> [A]t its root, the discretionary function exception is about power, not fairness. The sovereign has, by the exercise of its authority, reserved to itself the right to act without liability for misjudgment and carelessness in the formulation of policy.

(App. A, pp. 4a, 16a.)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION IMPLICATES AN IMPORTANT QUESTION OF FEDERAL JURISDICTION THAT SHOULD BE SETTLED BY THIS COURT: WHETHER THE MERE ASSERTION THAT AN IMPROVEMENT BEYOND THE MANDATED REPAIR WAS UNDER CONSIDERATION INVOKES THE DISCRETIONARY FUNCTION EXCEPTION.

In reaching its conclusion that the discretionary function exception to the FTCA applied, the Ninth Circuit commented that the cases discussing the exception were "contradictory" with "a fair amount of backing and filling" and were a "complex body of law." (App. A, pp. 6a-7a, 11a.) The Ninth Circuit noted that the decisions did not yield an established rule of law that could be applied and proceeded instead to compare the decisions to this case on their facts. (App. A, pp. 6a-7a, 13a.)

The Ninth Circuit's decision in this case concerns an important question of federal law that has not been, but should be, settled by this Court. *Under the Ninth Circuit's decision, the discretionary function exception to the FTCA could be made to apply, and the jurisdiction of the court could thus be avoided, simply by asserting that the United States did nothing because it was considering doing more than what it was required to do.*

Under the decision, the Corps had "discretion" to do nothing for an indefinite period of time until it decided to make (or not to make) any of the "improvements" it was "considering," despite the Corps' ongoing required maintenance of the breakwaters, the Corps' knowledge that the breakwaters were two to four feet below design specifications years before the devastating 1988 storm, and repeated storm damage to properties in the Harbor before the 1988 storm. (App. A, pp. 2a-4a, 13a-14a.) According to the opinion, as long as the Corps merely claimed it was considering an improvement, the Corps could avoid the jurisdiction of the court and avoid liability for failure to maintain the breakwaters, over which it had sole responsibility, even if the contemplated improvement was never made. Indeed, as of the June 1990 issue date of GDM3, the improvement considered in the 1984 report had not been made. In fact, no improvement had been made since 1976. (ER 206-207.) Nor did the Corps make necessary repairs to return the breakwater to the design height as "re-constructed," causing significant damage to those it purported to protect.

Thus, to escape liability, the United States could always assert that it was considering making improvements that would have subsumed any maintenance or repair, even if the improvement or repair is never made. Allowing the decision to stand would result in the discretionary function exception swallowing the FTCA rule. Certainly, Congress could not have intended such a result.

II.

IN NOT CONSIDERING THE CORPS' OWN REPORTS, THE DECISION RAISES AN IMPORTANT QUESTION AS TO WHICH SOURCES FOR THE PRESCRIBED COURSE OF CONDUCT MUST BE CONSIDERED IN DETERMINING JURISDICTION UNDER THE DISCRETIONARY FUNCTION EXCEPTION.

Under this Court's decisions in *Berkovitz v. United States*, 486 U.S. 531, 536-537, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988), and *United States v. Gaubert*, 499 U.S. 315, 322-323, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), the determination of jurisdiction under the discretionary function exception to the FTCA is a two-step process: (1) Does any federal statute, regulation or policy specifically prescribe a course of action for the employee to follow? (2) Even if that action involves an element of judgment, is the judgment of the kind that the discretionary function exception was designed to shield, *i.e.*, a legislative or administrative decision grounded in social, economic, and political policy? The question raised in the present case is whether a governmental agency's own policies or reports must be considered in determining whether the employee had discretion in taking or not taking the action in issue.

In *Berkovitz v. United States*, *supra*, 486 U.S. at 541-544, 108 S. Ct. at 1961-1963, 100 L. Ed. 2d 531, this Court examined federal regulations promulgated pursuant to the Public Health Service Act, 42 U.S.C. § 262(d), in concluding that the discretionary function exception did not bar a claim based on the licensing of a polio vaccine. In *United States v. Gaubert*, *supra*, 499 U.S. at 329-330, 111 S. Ct. at 1277, 113 L. Ed. 2d 335, this Court examined regulations promulgated pursuant to the Home Owners' Loan Act, 12 U.S.C. § 1464, and the National

Housing Act, 12 U.S.C. § 1730, and held that the exception applied because no formal regulations governed the conduct that allegedly had led to the loss of the property and monies of a thrift institution shareholder, and the regulations allowed for use of less formal means for the supervision of failed institutions.

In *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 817-819, 104 S. Ct. 2755, 2766-2767, 81 L. Ed. 2d 660 (1984), involving claims of negligence in inspecting and certificating certain aircraft for use that did not comply with safety regulations, this Court examined the Federal Aviation Administration's handbooks and manuals developed for use by employees outlining the "spot check" system devised for checking an aircraft for compliance with safety regulations. This Court concluded that the regulations and manuals empowered the employees to make policy judgments regarding the degree of confidence that might be placed on a manufacturer and the taking of calculated risks in executing the "spot checks." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, *supra*, 467 U.S. at 819-820, 104 S. Ct. at 2767-2768, 81 L. Ed. 2d 660.

In arriving at its decision in this case, the Ninth Circuit did not discuss any of the reports prepared by the Corps for the improvement, construction and maintenance of the breakwaters, although they were discussed in the appeal briefs and the petition for rehearing. (App. A.) Nor was there any discussion as to the reason for not considering the reports, other than a statement that the facts in the opinion were taken from the district court's findings of fact. (App. A-6773; App. B.)

Instead, the Ninth Circuit relied solely on Rivers and Harbors Act, 33 U.S.C. § 541, which sets forth factors in determining whether an "improvement upon which reports are required" should be made. *However, this action involved the*

Corps' failure to maintain the breakwaters as already improved and reported, not the failure to make the proposed improvements.

Thus, the Ninth Circuit apparently failed to consider the reports as a source of prescribed course of conduct for the Corps in determining whether the discretionary function exception applied. *Cf. ARA Leisure Services v. United States*, 831 F.2d 193, 195 (9th Cir. 1987) (discretionary function exception held not to apply in suit for failure to maintain road, as Park Service policies required roads to conform to original grades and alignments).

That notwithstanding, the reports that had been issued pursuant to 33 U.S.C. § 541 prescribed the Corps' course of conduct as to the "maintenance of the entire breakwater as re-constructed," as follows:

> 4. The project document provides for the improvement at Federal expense of a harbor at Redondo Beach for small-craft navigation as follows:
>
> (a) Reconstruction of about 1,485 linear feet of the existing breakwater;
>
> (b) Construction of a 2,800-foot extension to the existing breakwater and a south breakwater 700 feet long; and
>
> (c) *Maintenance of the entire breakwater as re-constructed, the breakwater extension and the south breakwater.* The improvement shall be generally in accordance with the plan of the district engineer and with such modifications thereof as in the discretion

> of the Chief of Engineers may be advisable. . . .
>
> * * *
>
> 28. The United States would maintain the breakwaters and aids-to-navigation facilities. . . .
>
> * * *
>
> 79. Under provisions of the authorizing legislation, the project would be operated and maintained by local interests, *except for maintenance of the breakwaters and aids-to-navigation.* Maintenance of the breakwaters is estimated at $30,000 per year.

(ER 160, 166, 173; emphases added.) The United States required the local interests to transfer ownership and rights-of-way to the United States of the lands upon which the breakwaters were to be situated for "construction and maintenance" of the improvement. (ER 156, 163.)

GDM2 confirmed that the breakwaters had been constructed pursuant to GDM1 and that the existing breakwaters were to be maintained by the United States. (ER 187.) GDM3 reflected that the United States had repaired the breakwaters in 1982, 1983, 1986 and 1988, *without any corresponding reports*. (ER 206-209.) 33 U.S.C. § 541 applies only to "improvements upon which reports are required." Thus, the Corps had already issued GDM1, GDM2 and GDM3 about the time the improvements were made, but issued no reports when the repairs were made. (ER 151, 175.)

GDM1 required the United States to maintain the breakwaters as "*re-constructed*," *i.e.*, in accordance with its

design specifications of plus 14 feet above MLLW. (ER 160.) GDM1, GDM2, and GDM3 thus provided for maintenance of the breakwaters to design specifications. The Corps testified that it was responsible for such maintenance and that repairs had been made to meet design specifications. (ER 265; SER 69, 74, 136-137.)

GDM1 and GDM2 provided for ongoing maintenance and made allowances for maintenance at federal expense. (ER 160, 166, 187.) At least two years before the 1988 storm, the Corps had discovered that the breakwaters had eroded two to four feet below design specifications. (ER 276-278.) Therefore, according to the Corps' own policies as stated in its reports, maintenance of the breakwaters to design specifications was *not* a matter of judgment for the Corps or a decision grounded in social, political or economic policy. The United States had required transfer of ownership of the property where the breakwaters were located and assumed the sole obligation to maintain and repair the breakwaters, after the improvements had been made.

Once having assumed that obligation, the Corps thus did not have discretion to disregard its own policies instituted pursuant to 33 U.S.C. § 541. The Corps' own requirements must be considered in determining whether that conduct at issue had been subject to a directive or left to the choice of the acting employee. If a court can elect to ignore such requirements, a claim that would otherwise fall within the court's jurisdiction would be barred, even though the federal agency may have violated its own specific mandate.

III.

THE DECISION RAISES AN IMPORTANT QUESTION AS TO WHEN, IF AT ALL, THE UNITED STATES CAN INVOKE THE DISCRETIONARY FUNCTION EXCEPTION BASED UPON BUDGETARY CONSIDERATIONS.

In its decision, the Ninth Circuit held that budgetary considerations can provide a basis for invoking the discretionary function exception. (App. A, p. 14a.) However, in reaching that holding, the court recognized that its prior decisions appeared at odds as to whether budgetary considerations could provide a basis for invoking the discretionary function exception. (*Id.*) In this regard, the court recognized that in the *ARA Leisure* case, the court had concluded that the agency could not invoke the discretionary exception based upon budgetary considerations, while in the *Kennewick* case, the court had held otherwise. (*Id.*) This contradiction notwithstanding, the court reasoned that these cases could be reconciled such that budgetary considerations can provide the basis for invoking the discretionary function exception when applicable statutes, regulations and policies mandate the consideration of costs. (*Id.*) The court then concluded that budgetary considerations could be considered in the decision not to maintain the design height of the breakwaters since 33 U.S.C. § 541 included the cost of work as a factor.[3] (App. A, pp. 14a-15a.) The court concluded:

> Where a statute or policy requires a particular government action, it has no discretionary function

---

3. As discussed *supra*, 33 U.S.C. § 541 is not applicable to the Corps' decision not to maintain the breakwaters at design height because the statute only applies to an "improvement upon which reports are required," and the maintenance of the breakwater was not an improvement and did not require reports. (*See supra* at 11.)

> immunity based on its choice to spend its money doing something else instead. But where a statute or policy plainly requires the government to balance expense against other desiderata, then considering the cost of greater safety is a discretionary function.

(App. A, p. 15a.)

Budgetary considerations are a factor that can be asserted as a basis for invoking the discretionary function exception in virtually any action under the Federal Tort Claims Act. As a result, the Ninth Circuit's decision as to when budgetary considerations can provide a basis for invoking the discretionary function exception is an important question of federal law which has not been, but should be, settled by this court.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 10, 1997

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-55531

D.C. No. CV-88-06962-MRP

National Union Fire Insurance; Restaurant Enterprises Group,

Plaintiffs-Appellees,

v.

United States of America,

Defendant-Appellant.

and

Army Corps of Engineers,

Defendant.

No. 94-55586

D.C. No. CV-88-06962-MRP

National Union Fire Insurance; Restaurant Enterprises Group,

Plaintiffs-Appellees-Cross-Appellants,

Appendix A

v.

United States of America,

Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
December 13, 1995 — Pasadena, California

Filed June 10, 1997

Before: Procter Hug, Jr., Chief Judge, Robert R. Beezer, and Andrew J. Kleinfeld, Circuit Judges.

* * *

OPINION

KLEINFELD, Circuit Judge:

This case turns on the discretionary function exception to the federal government's waiver of sovereign immunity for tort liability, under the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

Facts

For about a half century, the Army Corps of Engineers (Corps) has developed and improved King Harbor, in Redondo

Beach, California. The original purpose of the project was "to establish a harbor for small-craft navigation." Section 101, River & Harbor Act of 1950, Pub. L. No. 91-516, 64 Stat. 163, 166 (1950). It did so by building a fourteen foot breakwater, which was completed in 1958.

The fourteen foot breakwater built in 1958 was not high enough to keep waves from damaging boats in the harbor during storms. In the mid sixties, the Corps raised the level of portions of the breakwater to 22 feet. By then the City of Redondo Beach had begun developing this entirely man-made harbor. The City had constructed "moles," apparently massive deposits in the harbor on which building could take place. By the 1980s, the City of Redondo Beach was collecting $3.7 million in rent from the harbor, eight million people a year were visiting, and there were numerous restaurants, hotels, apartment complexes, sport fishing and whale watching tours, and boat and bicycle rental and sale facilities, grossing over $59 million a year.

Despite the elevation of portions of the breakwater to 22 feet, winter storms continued to cause damage, more dollars of damage as people developed the moles. After millions of dollars in damages during the winters of 1980 and 1983, the Corps studied possible major improvements, in addition to its annual maintenance. The plan was to increase the remaining 14 foot high portion of the breakwater to 22 feet.

In 1985, the Corps discovered that it had made a mistake in its calculations. The breakwater was not as high as it was supposed to be. The 14 foot section, over which the waves were washing, was only 12 feet high and not 14 feet. The Corps concluded that this was because the seafloor had subsided as a result of oil extraction. Because its measuring devices were out

of date, and it had not considered the potential for subsidence, the Corps had failed to discover the growing nonconformity of the breakwater to its design.

The Corps now had to decide whether to do nothing, raise the subsided portion of the breakwater back to fourteen feet, or await the results of an on-going study to decide whether to raise the breakwater in one larger project to 22 feet. Raising the breakwater a couple of feet was a major, not a trivial, engineering project. The Corps decided to leave the breakwater as it was, while it proceeded with studies directed toward more substantial improvement.

This decision was essentially a gamble on the weather. The Corps threw the dice, and the businesses on shore lost. A huge storm, the kind that hits Redondo Beach only once every sixty or seventy years, caused waves up to 21 feet high in January, 1988. They swept over the breakwater and caused almost $4 million dollars worth of damage to Reuben's Restaurant, whose owner and insurer brought this lawsuit. The theory of their lawsuit is that the government was negligent in failing to discover the subsidence and in failing to do something about it. The district judge held a bench trial, found liability and over $4 million dollars in damages, and awarded $2,485,110 in damages, as limited by the administrative claims plaintiffs' had filed. The government appeals the liability determination, while the insurer appeals the limitation on its damages.

Analysis

The facts above are taken from the district court's findings of fact as amplified by the exhibits and testimony. They are not at issue on this appeal. The controlling issue is whether the

discretionary function exception of the Federal Tort Claims Act barred jurisdiction. The United States has the burden of proving the applicability of the discretionary function exception. *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). We review *de novo* a district court determination that the discretionary function exception does not apply. *Richardson v. United States*, 943 F.2d 1107, 1110 (9th Cir. 1991).

The Federal Tort Claims Act subjects the United States to liability for torts by its employees, generally in the same manner and to the same extent as a private individual under like circumstances:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674.

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under

> circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

In addition to the statutory condition, that liability be measured by the extent to which a private person would be liable, there is a statutory exception for performance of discretionary functions:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused.*

28 U.S.C. § 2680(a) (emphasis added).

As the statute expressly provides, so long as the federal agency or employee was performing a "discretionary function," the exception applies, even if the discretion was abused. The cases are, if used merely as a source of "rules" in the form of quotations, hard to apply, because they seem on their face somewhat contradictory, with a fair amount of backing and

filling. Statements of law in cases are not statutes. They are explanations of why the court decided the particular case as it did. But when the facts of the cases are considered, the pattern becomes clear enough, and this case is plainly more analogous to the precedents holding that the discretionary function exception applies.

For purposes of analyzing the discretionary function question, we assume that the government should have discovered that the breakwater was not as high as it was meant to be, and failed to discover it only because it used outdated instruments. We also assume that had the Corps raised the breakwater two feet after discovering in 1985 that it was two feet lower than it was supposed to be, the 1988 storm would have done much less damage to Reuben's Restaurant. We further assume that the government's decision to put off the small improvement which would have raised the breakwater to design specifications, while it studied a much larger improvement, was a mistake in judgment and a failure to exercise reasonable care.

Despite these assumptions, we nevertheless feel compelled by controlling precedent to conclude that the discretionary function exception applies. The critical decision to which responsibility for the loss may be attributed was the one in 1985, to put off the smaller improvement while studying the possibility of a larger one. At that time, two and a half years before the storm which wrought the destruction, the Corps became aware of the subsidence, and the inadequate height of the breakwater. The issue, for the Corps, was what if anything to do about it, and when.

The Corps' statute directs it to consider the:

> desirability of commencing any and all improvements . . . . and in the consideration of such works and projects the Board shall have in view the amount and character of commerce . . . which will be benefitted by the improvement, and the relation of the ultimate cost of such work . . . and the public necessity for the work and propriety of its construction, continuance, or maintenance at the expense of the United States."

33 U.S.C. § 541. Note that the Corps is required by this statute to make a judgment balancing these sometimes conflicting considerations: (1) how much commerce benefits from the project; (2) what kind of commerce; (3) how much the project will cost; (4) how necessary is the work; (5) should the work be built, continued or maintained by the federal government, or some other entity.

In *Dalehite v. United States*, 346 U.S. 15 (1953), the government negligently stored fertilizer in vessels in a Texas harbor. The fertilizer exploded and killed many people. Nevertheless, the Supreme Court held that the discretionary function exception to the Federal Tort Claims Act shielded the government from liability. The Court distinguished between "acts of a governmental nature or function" and "ordinary common-law torts." *Id.* at 27-28. It noted that "Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions." *Id.* at 32. Discretion, in this context, means "the discretion of the executive or the administrator to act according to one's judgment of the best course." *Id.* at 34. It "includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations.

Where there is room for policy judgment and decision there is discretion." *Id.* at 35-36. The Court cited with approval a number of water destruction cases somewhat analogous to the one before us, such as property damage from changing the course of the Missouri, opening the gates of a dam, and releasing flood waters from a dam. *Id.* at 36 n.32. *Dalehite* notes that the decisions in that case were made "at a planning rather than operational level." *Id.* at 42. All the bad decisions which led to the catastrophe were made by the Field Director of Ammunition Plants, balancing safety against expense and reduced production, and that official's plan was faithfully carried out. The Court held that this planning error was insulated from liability. *Id.*

In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), a ship was grounded because the government employees maintaining a lighthouse failed to check and repair a light in a government lighthouse, and negligently left the light out. The Court held against the government, but not on the discretionary function exception. The government had argued that the Federal Tort Claims Act held it liable "in the same manner and to the same extent as a private individual," and since no private individuals operated lighthouses, it could not be liable at all. *Id.* at 64-65. The Court rejected the government's suggested inference that maintaining the light was an exclusively governmental function, which was therefore not subject to liability. *Id.*, 350 U.S. at 64-65. In *Indian Towing*, no one made a discretionary decision to leave the light out — the people who were supposed to maintain it simply failed to do so. *Id.*; *see also Kennewick Irrigation District v. United States*, 880 F.2d 1018, 1024 (9th Cir. 1989) (quoting *Berkovitz v. United States*, 486 U.S. 531, 538 n.3 (1988)).

In *United States v. Varig Airlines*, 467 U.S. 797 (1984),

numerous people had been killed, 124 because of a bathroom fire in a commercial airplane, 4 because of a baggage compartment fire in an air taxi. The airplane owners sued the government for negligently issuing airworthiness certificates. The FAA had just spot-checked the plans and specifications, so it failed to spot the design errors that caused the accidents. The deficiencies were missed not because spot checks were negligently carried out, but because they were not adequate to discover all errors. Deciding to use spot checks rather than analyzing every detail of the plans was, the Court held, a discretionary function. The Court said *Indian Towing* did not implicate the discretionary function exception at all. *Id.* at 812. *Cf. Gaubert v. United States*, 499 U.S. 315, 326 (1991); *Berkovitz v. United States*, 486 U.S. 531, 538 n.3 (1988), *Kennewick Irrigation District v. United States*, 880 F.2d 1018, 1024 (9th Cir. 1989). But *Varig* qualified the operational planning level distinction in *Dalehite*, by holding that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Id.* at 813. The Court characterized the purpose of the exception as preventing "judicial 'second guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *Id.* at 814.

In *Berkovitz v. United States*, 486 U.S. 531 (1988), a baby was paralyzed by a defective polio vaccine. His parents sued the government for licensing production and approving release of the vaccine. The Court held that both claims should survive a motion to dismiss under the discretionary function exception. *Id.* at 548. The reason was that in both cases, as pleaded, the claims could be understood to allege violation of existing policies, rather than formulation of policies which allowed the

harm to occur. "When a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply." *Id.* at 544. The "nature of the conduct" test requires courts to "consider whether the action is a matter of choice for the acting employee." *Id.* at 536.

In *Gaubert v. United States*, 499 U.S. 315 (1991), government regulators trying to prevent bank failure had allegedly required two banks to merge, and then regulated the survivor into failure. *Id.* at 319. A major shareholder sued the government for destroying the value of his shares by commanding the mismanagement of his bank. Even though the bad judgments were made at the operational rather than the planning level of the agency, the discretionary function exception was held to apply. The reason was that "each of the regulatory actions in question involved the kind of policy judgment that the discretionary function exception was designed to shield." *Id.* at 332.

We applied this complex body of law in *ARA Leisure Services v. United States*, 831 F.2d 193 (9th Cir. 1987). A tour bus in Denali National Park had rolled down a hill, killing 5 people and injuring 25. The reason was that there was no guardrail, the road had been allowed to erode from 28 feet to 14.6, and the shoulders were too soft to support the bus. We held that the lack of a guardrail could not give rise to liability, because of the discretionary function exception. The reason was that the National Park Service had made a policy decision to sacrifice human safety to esthetics. The guardrail was missing on purpose, so that the road would "lie[ ] lightly upon the land." *Id.* at 195. But the narrowness of the road and inadequate shoulders were not shielded from liability, because there was

no policy to allow that deterioration, and Park Service policies instead required that park roads conform to the original alignments and be firm. We rejected the government's argument that budgetary constraints should shield its inadequate road maintenance, because "the fact that Park Service maintenance personnel were required to work within a budget does not make their failure to maintain Thoroughfare Pass a discretionary function. . . ." *Id.*

In *Kennewick Irrigation District v. United States*, 880 F.2d 1018 (9th Cir. 1989), the government negligently designed and built an irrigation canal, using silt without a concrete liner. This caused a train derailment resulting in extensive injuries and property damage. We held that the discretionary function exception applied to the design of the canal. The reason was that no policy required use of a concrete liner to keep the silt from washing away, and the government's design decision necessarily rested on a balancing of expense and quality. We took note of the "separation of powers concerns" raised in *Varig* and concluded that the exception had to apply, because there was no specific statute, regulation or policy requiring the government to design the irrigation canal in a manner which would have avoided the harm, and there was no violation of an established policy binding upon any particular government actor. *Id.* at 1021-22, 1027-28.

In *Childers v. United States*, 40 F.3d 973 (9th Cir. 1995), an eleven year old died, allegedly because the National Park Service left a part of Yellowstone open in the winter without adequately warning of the dangerous condition of the trail where the boy died. We held that the discretionary function exception applied, because the applicable statutes and policies left it to the agency's discretion the balancing of preservation and public access,

requiring discretionary judgment about what sorts of safety features to provide. *Id.* at 974-76.

In *Glacier Bay United Cook Inlet Drift Association v. Trinidad Corporation*, 71 F.3d 1447 (9th Cir. 1995), an oil tanker ran aground on a rock which was not shown in the nautical chart. The owners sued the government for negligence in preparing the chart. We held that the exception did not apply, because the government manual and instructions required the soundings every 50 meters, and they did not do that. We interpreted *Berkovitz* and *Kennewick* to require a two-step analysis: first, whether the challenged action involved an element of choice or judgment, and if not, whether a federal statute regulation or policy specifically prescribed a course of action for an employee to follow. *Id.* at 1450. Second, we were to consider whether the judgment involved considerations of social, economic or political policy such that Congress should be understood to have shielded it from judicial review. *Id.* "The proper question to ask is not whether the Government as a whole had discretion at any point, but whether its allegedly negligent agents did in each instance." *Id.* at 1451.

We are compelled to conclude that this case is more analogous to *Dalehite, Varig, Gaubert, Kennewick, Childers,* and the guardrail in *ARA Leisure,* than *Berkovitz, Indian Towing,* and *Glacier Bay,* and the road width and shoulder in *ARA Leisure.* The decision in our case necessarily involved the exercise of discretionary judgment to balance the five statutory factors that are supposed to inform Corps decisions. No regulation or policy required the Corps to do something that it failed to do. No individual violated any specific regulation or policy. People at the planning level, *see Gaubert,* 499 U.S. at 335 (Scalia, J. concurring), exercised discretionary judgment about what the

Corps should do about the breakwater, and decided to do nothing for the time being, because they thought it wiser to roll the smaller repair into a bigger improvement later. Both parts of the *Berkovitz* test were satisfied. The Corps had statutory discretion, and the judgment was based on considerations of public policy.

There is an element which appears to make this case more like the road width in *ARA Leisure* than it really is. It was plain in *ARA Leisure* that the road was supposed to be 28 feet wide and was only 14 feet wide, and was supposed to have firm shoulders but instead had soft shoulders. *ARA Leisure,* 831 F.2d at 195. Likewise in the case at bar, the breakwater was supposed to be 14 feet high and it was only 12 feet high. That increased the force of the waves, which destroyed Reuben's Restaurant. But the legal difference is more significant than the factual similarity. In *ARA Leisure,* the regulation required the Park Service employees to keep the road shoulders firm and the road width at 28 feet. *Id.* In the case at bar, the breakwater height was specified in its design, but there was no regulation or policy requiring the Corps to monitor the breakwater height and assure that it continued to conform to its design specifications.

A word also needs to be said about cost. In *ARA Leisure,* we said that the agency could not invoke the discretionary function exception based on budgetary considerations, but in *Kennewick* we said that it could. In this case we also say that it could. These cases can be reconciled; whether the government can take cost into account depends on the applicable statutes, regulations, and policies. In *ARA Leisure,* the regulation required the Park Service to maintain the road width and firmness, not to balance that goal against what it would cost. In the case at bar, the statute expressly requires the Corps to consider the "relation

of the ultimate cost of such work" to the other factors in deciding whether to do the work. 33 U.S.C. § 541. Where a statute or policy requires a particular government action, it has no discretionary function immunity based on its choice to spend its money doing something else instead. But where a statute or policy plainly requires the government to balance expense against other desiderata, then considering the cost of greater safety is a discretionary function.

Appellee argues that once the government built the breakwater, it was under a duty to maintain it in a safe condition. That may be a correct statement of tort law, but we are not persuaded that it is true as a matter of the discretionary function exception. No statute, regulation or policy required the Corps to do so, and the applicable statute expressly gave the Corps discretion about whether to do so.

None of this is to suggest that the discretionary decision the government made was right. Congress expressly made the discretionary function exception applicable even where there is an "abuse of discretion." The wrong which makes this case troubling is that the government created a man-made harbor, people invested great fortunes in reliance upon the safety of the harbor, yet because of discretionary decisions made by the government, their property was damaged. But reasonable reliance on the government does not necessarily give rise to governmental duty. *Cf. Madera Irr. Dist. v. Hancock,* 985 F.2d 1397, 1403 (9th Cir. 1993). The government has an incentive to make itself reliable, because otherwise it must offer greater inducements and impose more coercion in order to elicit the conduct it desires. *See id.* at 1401. But it retains policy flexibility, in circumstances such as those of the case at bar.

We therefore conclude that the discretionary function exception to the Federal Tort Claims Act applied, so the district court lacked jurisdiction to award damages against the United States. Application of the exception is often troubling, because it may be a shield for carelessness and poor judgment. (We do not intimate that it was in this case.) Private actors generally must pay for the harm they do by carelessness. The government's power to tax enables it, better than any private actor, to perform its conduct with reasonable care for the safety of persons and property, and to spread the cost over all the beneficiaries if its conduct negligently causes harm. Fairness might seem to suggest that the government should be liable more broadly than private actors. But at its root, the discretionary function exception is about power, not fairness. The sovereign has, by the exercise of its authority, reserved to itself the right to act without liability for misjudgment and carelessness in the formulation of policy.

We do not reach the question whether there was negligence under California tort law, or the question on the cross-appeal of whether the insurer's recovery was properly limited by its administrative claim.

REVERSED.

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED NOVEMBER 30, 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 88-6962 MRP

NATIONAL UNION FIRE INSURANCE COMPANY, a Pennsylvania corporation; et al.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 22, 23, 26 and 27, 1993, the issues of liability and causation were tried to the Court. The Court renders its Findings of Fact and Conclusions of Law on the issues tried:

FINDINGS OF FACT

1. Plaintiff The Restaurant Enterprises Group owns Reuben's Restaurant No. 38 which is situated on a land structure, known as Mole C, in the Redondo Beach King Harbor, and plaintiff National Union Fire Insurance Company ("National Union") is its property insurance carrier.

2. Plaintiffs contend that the United States Army Corps of

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Engineers' negligence in constructing, improving and maintaining the breakwater at Redondo Beach King Harbor caused Reuben's Restaurant to be damaged during a severe storm on January 17-18, 1988.

3. Subsidence due to petroleum withdrawal was identified in the Los Angeles Harbor by 1945 and determined to have commenced in 1937.

4. By 1945, defendant the United States of America ("the Government") had hired a consultant to investigate the subsidence from petroleum withdrawal in the Los Angeles Harbor. By that time, the Government was aware of the phenomenon of subsidence from petroleum withdrawal.

5. By 1960, the Los Angeles Harbor had subsided more than 30 feet.

6. The United States Naval Shipyard had been damaged by waves due to the subsidence from petroleum withdrawal in the Los Angeles Harbor. As a result, the Department of Justice filed suit against oil companies for damages and to stop the petroleum withdrawal in the 1960's.

7. Despite the Government's knowledge of the potential for subsidence from petroleum withdrawal, the Government never considered this potential in its activities involving the north breakwater ("the breakwater") in the King Harbor at Redondo Beach until after the January 1988 storms.

8. In 1937, the City of Redondo Beach, with federal funding, began construction of the breakwater in what is now King Harbor. Initial construction of that breakwater was

completed in 1939 with the placement of a 1,470 foot long stone breakwater.

9. The Rivers and Harbors Act of 1950 granted the Army Corps of Engineers ("the Army Corps"), under the supervision of the Chief of Engineers, the authority to improve harbors such as King Harbor.

10. Pursuant to the Rivers and Harbor Act of 1950, the Army Corps prepared General Design Memorandum No. 1 in 1955. That project called for the raising of the elevation of the 1939 breakwater to +14 feet above mean lower low water ("MLLW"), an extension of the length of the breakwater by 2,430 feet, and the construction of a 600-foot-long south breakwater. That construction was completed in 1958. At no time during the design and construction did the Army Corps consider the potential of subsidence to the breakwater from petroleum withdrawal.

11. In 1963, the Army Corps authorized a study of remedial measures for the Redondo Beach King Harbor breakwater. That study resulted in the issuance by the Army Corps in 1964 of General Design Memorandum No. 2, which recommended raising the elevation of the breakwater to +22 feet MLLW between stations 15+50 and 36+00. That construction was completed in 1964. At no time during the design and construction did the Army Corps consider the potential of subsidence to the north breakwater from petroleum withdrawal.

12. The Army Corps failed to survey the portion of the breakwater from stations 36+00 to 52+00 designed to be 14 feet in height following the completion of the 1964 construction.

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13. During the storms of 1978 and 1980, the breakwater sustained damage, and the Army Corps repaired that damage.

14. In the first three months of 1983, Redondo Beach King Harbor was struck by eight separate storm systems. As a result, the Army Corps prepared an evaluation report dated September 1984. The report identified the problem as frequent wave overtop at the section of the breakwater designed to be +14 MLLW. The Army Corps recognized that the overtopping resulted in undesirable wave action in the harbor damaging waterfront property.

15. Between 1964 and 1985, the Army Corps failed to survey the height of the north breakwater.

16. The Army Corps conducted a survey of the height of the breakwater at the Redondo Beach King Harbor in 1985 which revealed that the breakwater was as much as four feet below its designed height. Portions of the breakwater which were designed in Design Memorandum No. 1, Exhibit 13 in evidence, to be +14 feet MLLW were only +10 feet MLLW and portions that were designed in Design Memorandum No. 2, Exhibit 14 in evidence, to be +22 feet MLLW were only +20 feet MLLW.

17. Although the Government had assumed the obligation to maintain the breakwater and the Army Corps discovered the discrepancy in the height of the breakwater in 1985, no repairs were made to return the breakwater to its designed height between the time of the discovery of the discrepancy in 1985 and the January 1988 storm.

18. Repairs to return the breakwater to its design height could have been completed in the years that passed between the

time of the discovery of the discrepancy in the height of the breakwater in the 1985 survey and the January 1988 storm, pursuant to the Government's authority and obligation to maintain the breakwater to its plans and specifications.

19. The Government still failed to make the necessary repairs to the breakwater and further failed to do so notwithstanding the fact that Mole C was being subjected to damage by events which occurred yearly.

20. Although tide gauges have existed for more than 100 years, the Army Corps never installed a tide gauge in King Harbor until after the January 1988 storm. As the Army Corps has acknowledged, a tide gauge allows the measurement of mean lower low water based upon water levels. The Army Corps only installed a tide gauge in King Harbor based upon the observations of the contractor making repairs to the breakwater after the January 1988 storm. The contractor reported that the benchmarks provided to him were not consistent with the tides he observed. As a result, a tide gauge was installed so that future construction would be built according to actual water levels.

21. The highest significant wave height to impact the north breakwater at the King Harbor in Redondo Beach during the January 1988 storm was approximately 21 feet.

22. The difference between the height of the north breakwater as designed in the Army Corps' General Design Memorandum No. 1 and General Design Memorandum No. 2 and as surveyed by the Army Corps in 1985 made the breakwater more susceptible to breaches during the January 1988 storm.

23. The difference between the height of the breakwater

as designed in the Army Corps' General Design Memorandum No. 1 and General Design Memorandum No. 2, and as surveyed by the Army Corps in 1985, caused the highest significant wave height in the Redondo Beach King Harbor during the January 1988 storm to increase by two feet, which doubled the energy of the waves in the harbor.

24. The highest significant height of the waves that washed up on Mole C at Reuben's Restaurant during the January 1988 storm were two feet higher than the highest significant height that the waves would have been if the breakwater had been at its designed height.

25. The waves that washed up on Mole C at Reuben's Restaurant during the January 1988 storm had twice the energy that the waves would have had if the breakwater had been at its designed height.

26. A severe storm struck the Redondo Beach King Harbor area on January 17-18, 1988. That storm caused severe damage to Reuben's Restaurant.

27. Plaintiff National Union paid the claim of plaintiff The Restaurant Enterprises Group under the policy for damages to Reuben's Restaurant resulting from the January 17-18, 1988 storm, and has established damages as follows:

Damage to Building Structure	$1,915,007.00
Damage to Building Contents	$ 356,046.00
Business Interruption	$1,478,947.00
Total	$3,750,000.00

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28. Plaintiff The Restaurant Enterprises Group has established damages over and above the $3,750,000.00 policy benefits received from plaintiff National Union, and resulting from the January 17-18, 1988 storm as follows:

Damage to Building Structure	$ 75,000.00
Damage to Building Contents	$ 18,739.00
Business Interruption	$122,371.00
Retaining Wall Construction	$ 19,100.00
Parking Lot Repairs	$ 35,800.00
Landscaping Replacement	$ 34,500.00
Lighting Repair	$ 27,000.00
Pre-Opening Expenses	$ 56,600.00
Supervision of Repairs	$ 46,000.00
Restaurant Enterprises share of the Cost to Construct the Sea Wall Required by the City of Redondo Beach	$ 50.000.00
Total	$485,110.00

29. At least one purpose of the breakwater was the protection of shore structures such as Reuben's Restaurant.

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30. Plaintiffs relied upon the protection that the breakwater was designed to provide in situating Reuben's Restaurant on Mole C.

31. To the extent the discrepancy in the crest elevation of the breakwater is the result of subsidence in the Redondo Beach King Harbor area due to petroleum and/or groundwater withdrawal, the Army Corps knew or should have known of the potential for such subsidence when designing, constructing, maintaining and improving the breakwater.

32. The Army Corps failed to consider the potential for subsidence due to petroleum and/or groundwater withdrawal in the Redondo Beach King Harbor area when constructing, maintaining and improving the breakwater.

33. Defendant failed to use reasonable care in constructing, improving and maintaining the breakwater.

34. The damage to Reuben's Restaurant was the result of defendant's failure to use reasonable care in designing, constructing, improving and maintaining the breakwater.

35. The discrepancy in the crest elevation of the breakwater is not due to any voluntary action or contribution on the part of plaintiffs.

36. The 2-foot to 4-foot discrepancy in the crest elevation of the breakwater was a substantial factor in causing the damages that occurred to Reuben's Restaurant in the January 1988 storm.

37. Any of the Conclusions of Law set forth below deemed to be Findings of Fact are hereby incorporated herein.

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CONCLUSIONS OF LAW

1. The Court has jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq.*

2. Venue is proper under 28 U.S.C. § 1402(b) since the act or omission complained of occurred in the Central District of California.

3. Because the government voluntarily built and maintained the seawall and plaintiffs relied on the government's maintenance of the seawall, defendant owed plaintiffs a duty to exercise reasonable care in designing, constructing, maintaining, and improving the breakwater. *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122 (1955); *Williams v. State of California*, 34 Cal.3d 18, 22 (1983).

4. The discrepancy between the crest elevation of the breakwater as designed in the Army Corps' General Design Memorandum No. 1 and General Design Memorandum No. 2 and as surveyed in 1985 by the Army Corps is the result of defendant's breach of a duty it owed plaintiffs.

5. The failure of the Army Corps to consider the potential for subsidence due to petroleum withdrawal in the Redondo Beach King Harbor area when designing, constructing, maintaining and improving the breakwater was negligent.

6. The discrepancy between the crest elevation of the breakwater as designed in the Army Corps' General Design Memorandum No. 1 and General Design Memorandum No. 2 and as surveyed in 1985 by the Army Corps was a proximate and legal cause of the damage to the structures situated on the

moles in the Redondo Beach King Harbor, including Reuben's Restaurant.

7. Plaintiff The Restaurant Enterprises Group was not negligent in situating Reuben's Restaurant on Mole C.

8. The Government may not raise the defense of assumption of the risk since said defense was not raised as an affirmative defense in the Government's answer.

9. Flood control was not a purpose of the breakwater within the meaning of 33 U.S.C. § 702c. *McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1988); *Peterson v. United States*, 367 F.2d 271 (9th Cir. 1966).

10. 33 U.S.C. § 702c does not apply so as to preclude the Court's subject matter jurisdiction to entertain this action. *McCarthy v. United States*, *supra*, 850 F.2d 558; *Peterson v. United States*, *supra*, 367 F.2d 271.

11. The causes of the discrepancy between the crest elevation of the breakwater as designed in the Army Corps' General Design Memorandum No. 1 and General Design Memorandum No. 2, and as surveyed in 1985 by the Army Corps, were not the result of a decision on the part of defendant subject to the discretionary function exception, 28 U.S.C. §§ 1346(b) and 2680(a). *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1945, 1958 (1988); *Indian Towing v. United States*, *supra*, 350 U.S. 61, 76 S. Ct. 122.

12. The purported decision by the Army Corps not to maintain the breakwater at the levels set in General Design Memorandum No. 1 and General Design Memorandum No. 2 is

not subject to the discretionary function exception. *Denham v. United States*, 834 F.2d 518 (5th Cir. 1987).

13. The provisions of the insurance policy pursuant to which plaintiff National Union paid plaintiff The Restaurant Enterprises Group are not at issue in this case in that (1) the terms of that policy have no bearing on whether the breakwater is a flood control project within the meaning of 33 U.S.C. § 702c, and (2) the Government has not asserted as an affirmative defense that plaintiff National Union acted as a volunteer.

14. The discrepancy between the crest elevation of the breakwater as designed in the Army Corps' General Design Memorandum No. 1 and General Design Memorandum No. 2, and as surveyed in 1985 by the Army Corps, legally and proximately caused a discrepancy between the intended height and the actual height of Mole C.

15. The damage to Reuben's Restaurant was the result of defendant's failure to exercise reasonable care in designing, constructing, maintaining and improving the breakwater.

16. The District Court has jurisdiction under the Federal Tort Claims Act to determine actual damages caused by the United States in excess of an administrative claim filed by the injured party, and any offset is reduced from the amount of actual damages rather than from the limit on the judgment established by the administrative claim. *Martinez v. United States*, 780 F.2d 525 (5th Cir. 1986); *Dickens v. United States*, 545 F.2d 886, 893 (5th Cir. 1977).

17. The government's negligence was the legal and proximate cause of $3,750,000 damage to plaintiff National

Union and $485,110 damage to plaintiff The Restaurant Enterprises Group.

18. Any of the Findings of Fact set forth above deemed to be Conclusions of Law are hereby incorporated herein.

DATED: November 30, 1993

s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 29, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-55531

D.C. No. CV-88-06962-MRP

NATIONAL UNION FIRE INSURANCE; RESTAURANT ENTERPRISES GROUP,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant,

and

ARMY CORPS OF ENGINEERS,

Defendant.

No. 94-55586

D.C. No. CV-88-06962-MRP

NATIONAL UNION FIRE INSURANCE; RESTAURANT ENTERPRISES GROUP,

Plaintiffs-Appellees-
Cross-Appellants,

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v.

UNITED STATES OF AMERICA,

Defendant-Appellant-
Cross-Appellee.

ORDER

Before: HUG, Chief Judge, BEEZER, and KLEINFELD, Circuit Judges.

The panel has voted to deny National Union Fire Insurance Company and The Restaurant Enterprises Group's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D — RELEVANT STATUTES

28 U.S.C. § 1346(b)(1)

§ 1346. United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

28 U.S.C. § 2671

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or

naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

* * *

28 U.S.C. § 2674

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United

States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * *

28 U.S.C. § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

33 U.S.C. § 541

§ 541. Board of Engineers for Rivers and Harbors; establishment; duties and powers generally

There shall be organized in the Office of the Chief of Engineers, United States Army, by detail from time to time from the Corps of Engineers, a board of seven engineer officers, a

majority of whom shall be of rank not less than lieutenant colonel, whose duties shall be fixed by the Chief of Engineers, and to whom shall be referred for consideration and recommendation, in addition to any other duties assigned, so far as in the opinion of the Chief of Engineers may be necessary, all reports upon examinations and surveys provided for by Congress, and all projects or changes in projects for works of river and harbor improvement prior to June 13, 1902, or thereafter provided for. And the board shall submit to the Chief of Engineers recommendations as to the desirability of commencing or continuing any and all improvements upon which reports are required. And in the consideration of such works and projects the board shall have in view the amount and character of commerce existing or reasonably prospective which will be benefited by the improvement, and the relation of the ultimate cost of such work, both as to cost of construction and maintenance, to the public commercial interests involved, and the public necessity for the work and propriety of its construction, continuance, or maintenance at the expense of the United States. And such consideration shall be given as time permits to such works as have, prior to June 13, 1902, been provided for by Congress, the same as in the case of new works proposed. The board shall, when it considers the same necessary, and with the sanction and under orders from the Chief of Engineers, make, as a board or through its members, personal examinations of localities. And all facts, information, and arguments which are presented to the board for its consideration in connection with any matter referred to it by the Chief of Engineers shall be reduced to and submitted in writing, and made a part of the records of the office of the Chief of Engineers. It shall further be the duty of said board, upon a request transmitted to the Chief of Engineers by the Committee on Public Works and Transportation of the House of Representatives, or the

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Committee on Environment and Public Works of the Senate, in the same manner to examine and report through the Chief of Engineers upon any projects adopted, prior to June 13, 1902, by the Government or upon which appropriations have been made, and report upon the desirability of continuing the same or upon any modifications thereof which may be deemed desirable. As used in this section the term "commerce" shall include the use of waterways by seasonal passenger craft, yachts, house boats, fishing boats, motor boats, and other similar water craft, whether or not operated for hire.

The board shall have authority, with the approval of the Chief of Engineers, to rent quarters, if necessary, for the proper transaction of its business, and to employ such civil employees as may, in the opinion of the Chief of Engineers, be required for properly transacting the business assigned to it, and the necessary expenses of the board shall be paid from allotments made by the Chief of Engineers from any appropriations made by Congress for the work or works to which the duties of the board pertain.

* * *